No. 15393.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

DAVID DIAMOND, etc., and FREEDA DIAMOND, etc.,

Appellees.

APPELLANT'S OPENING BRIEF.

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Jurisdiction.

Appellant, plaintiff in the court below, brought actions in the District Court against each of the appellees, seeking to set aside the orders admitting them to citizenship and to cancel their certificates of naturalization [R. 3-19].[1] After trial was completed and the causes taken under submission [R. 421], the Trial Court dismissed the actions against appellees [R. 39] for lack of jurisdiction [R. 37]; since no "affidavit showing good cause" was filed with or prior to the institution of these actions" [R. 36]. It is the position of appellant that the court below erred in dismissing these actions, and that the District Court had jurisdiction to decide the actions against appellees on their merits.

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[1]"R." refers to printed Transcript of Record.

Since the order of the District Court [R. 39] was a final decision, this Court has jurisdiction of an appeal from that decision pursuant to 28 U. S. C., Section 1291.

Statement of the Case.

On November 1, 1954, appellant filed complaints in the District Court against each of the appellees, seeking to set aside the orders admitting them to citizenship and to cancel their certificates of naturalization [R. 3-19]. Affidavits showing good cause were not filed with the complaints; however, such affidavits were in possession of the United States Attorney at the time the actions were instituted [Exs. 1 and 16; R. 124-125].

On March 1, 1955 and March 25, 1955, appellees David Diamond and Freeda Diamond moved respectively to dismiss appellant's actions on the ground, *inter alia,* that the Court did not have jurisdiction over the actions in that the complaints were not supported by affidavits showing good cause [R. 20, 22]. The District Court denied the motions of appellees David Diamond and Freeda Diamond on March 21, 1955 and May 31, 1955, respectively [R. 21, 23], relying upon the decision of this Court in *Schwinn v. United States,* 112 F. 2d 74, 75-76 (C.C.A. 9, 1940), affirmed 311 U. S. 616 [R. 36]. After answers were filed by appellees [R. 23-30], the Court ordered the causes consolidated for trial [R. 35].

Trial commenced on February 28, 1956 [R. 43]. On the opening day of trial, affidavits showing good cause relating to both appellees were offered and received in evidence [R. 123-127, Exs. 1 and 16]. At the same time counsel for appellant offered to testify that when the complaints were filed, the affidavits were in possession of the office of the United States Attorney. Counsel for

each of the appellees, however, stipulated that counsel for appellant would so testify [R. 124-125]. These affidavits had been shown to counsel for appellee Freeda Diamond at a pre-trial conference and said counsel had been informed that they were to be introduced at trial as to both appellees [R. 125, 126]. On February 29, 1956, a copy of the affidavits was served on counsel for each of the appellees [R. 238-239]. Trial proceeded, during which appellant offered the testimony of nine witnesses: four naturalization examiners [R. 45-172]; three former members of the Communist Party [R. 173-385], one handwriting expert [R. 385-392], and one fingerprint expert [R. 394-396]; and forty-three exhibits were received in evidence on behalf of appellant [Exs. 1 through 29 and 31 through 44]. On March 2, 1956, the trial was continued in order to allow counsel for appellees an opportunity to prepare for further cross-examination of certain of appellant's witnesses [R. 415-416, 418].

On May 4, 1956, when trial recommenced [R. 419], appellees waived further cross-examination of appellant's witnesses, and rested their cases [R. 419]. The Court took the causes under submission [R. 421] and gave each of the parties 30 days to file briefs on the effect of the decision of the Supreme Court in *United States v. Zucca*, 351 U. S. 91, which had been rendered on April 30, 1956 [R. 421].

On July 27, 1956, the Court entered its Order dismissing appellant's actions without prejudice [R. 39]. The present appeals are being taken from the District Court's Order of Dismissal.

Statement of Points.

The following statement of points applies to each of the appeals:

(1) The District Court erred in dismissing appellant's action to revoke and set aside the Order admitting appellee to citizenship and to cancel his/her Certificate of Naturalization.

(2) The District Court erred in holding that appellant's failure to file an affidavit pursuant to Section 340(a) of the Immigration and Nationality Act at the time the action was instituted was jurisdictional.

(3) The District Court erred in refusing to recognize the Affidavit filed by appellant during trial as a sufficient compliance with Section 340(a) of the Immigration and Nationality Act.

(4) The District Court erred in refusing to recognize the evidence adduced by appellant during trial as a cure of any defect which may have arisen by reason of appellant's failure to file an Affidavit at the time the action was instituted.

(5) The District Court erred in refusing to adjudicate the action upon its merits, since the entire trial had been completed and the cause taken under submission.

Questions Presented.

1. Was the omission of appellant to file with the complaints affidavits showing good cause, which were then in possession of the United States Attorney, a jurisdictional defect so as to require dismissal of the appellant's

actions after trial was completed and the causes taken under submission?

2. Was the defect, if any, arising from appellant's omission to file affidavits showing good cause with the complaints thereafter cured?

3. Did the District Court err in dismissing appellant's actions since appellees were in no way prejudiced by the initial omission of appellant to file affidavits showing good cause?

Statutes Involved.

Section 340(a) of the Immigration and Nationality Act, 66 Stat. 260, 8 U. S. C. A. §1451(a), provides in part:

> "Sec. 340(a). It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefore, to institute proceedings in any court specified in subsection (a) of section 310 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively: * * *"

Summary of Argument.

The filing of the affidavit required by Section 340(a) of the Immigration and Nationality Act is procedural, rather than jurisdictional; and the fact that it is not filed when the original complaint is filed does not render the proceedings void *ab initio* as the Court below seemed impelled by the decision in *United States v. Zucca,* 351 U. S. 91 (1956), to hold. Appellant's position is in accord with the language of the majority in *Zucca,* and with the decisions of most of the district courts that have considered the question. Moreover, the procedural nature of the requirement that the affidavit be *filed* is more clearly delineated in the instant cases than in *Zucca.* The *Zucca* decision does not indicate that an affidavit showing good cause was even in existence; whereas in the cases at bar affidavits as to both appellees were in possession of the United States Attorney when the complaints were filed.

Whether the filing requirement be deemed procedural or jurisdictional, initial noncompliance by appellant was cured through receipt in evidence of the affidavits and through evidence produced by appellant during trial, which not only showed good cause for instituting the actions, but established the allegations of the complaints by clear, convincing, and unequivocal evidence. Thus, appellees were in no way prejudiced by the fact that the affidavits were not filed originally, and the defect resulting, if any, was harmless. Appellees are not innocent persons whose reputation has been tarnished by unfound litigation. The Government was fully warranted in bringing denaturalization suits against them.

ARGUMENT.

I.

The Omission of Appellant to File With the Complaints Affidavits Showing Good Cause, Which Were Then in Possession of the United States Attorney, Was Not a Jurisdictional Defect so as to Require Dismissal of Appellant's Actions.

The District Court apparently interpreted the Supreme Court's decision in *United States v. Zucca,* 351 U. S. 91 (1956), to mean that any suit for denaturalization instituted without an affidavit showing good cause having been filed before or at the time the complaints are filed, is void *ab initio,* and is required to be dismissed. In its Memorandum Opinion, the Court below stated [R. 37]:

> "* * * it is my view that the language of the Supreme Court in effect makes the filing of such affidavits *jurisdictional* to the maintenance of denaturalization proceedings. *Any action instituted without the filing of an affidavit is premature and circumvents the provisions of said Section 340.*" (Emphasis added.)

This extreme position would not seem to be justified, either by the language of the majority in *Zucca,* or by the facts of the instant appeals. As the court below noted [R. 37], the Supreme Court studiously avoided characterizing the affidavit requirement as jurisdictional— purposefully, appellant submits. Had the Supreme Court deemed the filing of the affidavit jurisdictional, it would have been impelled to so state, due to the impact such a decision would have on pending cases.[2]

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[2]The Supreme Court was undoubtedly aware of other decisions involving the affidavit question: See, for example, *United States v. Candela,* 131 F. Supp. 249 (S.D. N.Y. Oct. 14, 1954).

On the other hand, repeated references by the majority to "prerequisite to maintenance of" an action and use of the word "procedural," appellant believes, were words of art designed to forestall an argument that filing of the affidavit was jurisdictional and to convey the view that an omission to file is merely a procedural defect which may be cured or waived. This construction seems particularly justified in view of the fact that the sentence embodying the Court's ultimate conclusion speaks of the requirement as "procedural." The Supreme Court said (351 U. S. at p. 99):

> "* * * We hold that this is the only Section under which a United States Attorney may institute denaturalization proceedings, and that the affidavit showing good cause is a *procedural* prerequisite to the maintenance of proceedings thereunder." (Emphasis added.)

Moreover, the *Zucca* decision itself indicates that the initial failure to file the affidavit is not *ipso facto* fatal. The District Court in *Zucca* did not immediately dismiss the action, but ordered "the complaint dismissed unless the Government filed an affidavit showing good cause within 60 days"[3] (351 U. S. at p. 91). As this was not done the action was dismissed without prejudice. The apparent approval by the Supreme Court of the conditional dismissal by the District Court is persuasive that the Supreme Court did not regard the original omission as vitiating.

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[3]The opinion of the District Court indicates that the period allowed was 15 days, rather than 60 days. See, *United States v. Zucca,* 125 F. Supp. 551, at page 557.

To the same effect:

United States v. Candela, 131 F. Supp. 249 (S. D. N. Y., Oct. 14, 1954);

United States v. Costello (S. D. N. Y., Dec. 9, 1955—opinion not reported).

Subsequent to the *Zucca* decision, District Courts have generally adopted the view that omission to file the affidavit when the original complaint is filed does not render the proceedings void *ab initio.* In *United States v. Costello,* Civ. 79-309 (S. D. N. Y., May 21, 1956—opinion not reported), the original complaint was filed on October 22, 1952, while an affidavit showing good cause was not filed until November 17, 1955. Judge Dimock, in denying Costello's motion to dismiss, declared:

> "The question is thus presented whether the Supreme Court meant that filing was a jurisdictional prerequisite or merely a procedural prerequisite. R. F. C. v. Prudence Group, 311 U. S. 579. I can find nothing in the opinion which would indicate that the Supreme Court regarded the requirement as jurisdictional. There is no suggestion that a denaturalization order would be void if the affidavit had not been filed with the complaint. There is no suggestion that a court could not, upon proper terms, permit the late filing of the affidavit in a pending proceeding. On the other hand, in five places in the opinion, the word 'procedural' is applied to the requirement."

In *United States v. Rocco Pelligrino,* Civ. 93-366 (S. D. N. Y., Oct. 11, 1956—opinion not reported), the court granted the Government's motion to amend the complaint to include the affidavit, late filing of the affidavit was permitted in *United States v. James K. Yanoff* (S. D.

Ohio, July 31, 1956), and other District Courts have denied motions to dismiss because the affidavit was not filed with the original complaint (*United States v. Sam Adel,* Civ. No. 17522 (S. D. Calif., April 1, 1957—no opinion); *United States v. Matles* (E. D. N. Y., Aug. 14, 1956—no opinion); *contra: United States v. Gaetano Lucchese,* Civil No. 13052 (E. D. N. Y., now pending on appeal before the United States Court of Appeals for the Second Circuit)).

Moreover, the *Zucca* decision is distinguishable from the present appeals. In *Zucca,* there was no showing that an affidavit showing good cause was even in existence at the time the complaint for denaturalization was filed. Before the Supreme Court the Government apparently took the position that the power to maintain denaturalization suits was found in the general duty of United States Attorneys to prosecute all civil actions in which the United States was concerned and that an affidavit was required only when the proceeding was to be brought on the complaint of a private citizen (see 351 U. S. at p. 95). In the case at bar, however, affidavits showing good cause were in possession of the United States Attorney at the time the complaints were filed [R. 124-125]. The instant actions were not instituted by the United States Attorney upon his own initiative, but upon affidavits showing good cause.

II.

The Defect, if Any, Arising From Appellant's Omission to File Affidavits Showing Good Cause With the Complaints Was Thereafter Cured.

Procedural defects, or even in some cases jurisdictional defects, may be cured by subsequent proceedings.

Fujii v. Dulles, 224 F. 2d 906 (C. A. 9, 1955);

Milleson v. United States, 78 F. 2d 60 (C. C. A. 8, 1935);

Liquid Veneer Corporation v. Smuckler, 90 F. 2d 196, 202 (C. C. A. 9, 1937);

Third Nat. Bank & Trust Co. v. United States, 53 F. 2d 599 (C. C. A. 6, 1931).

In *Third Nat. Bank & Trust Co. v. United States, supra,* where in an action on a war risk policy a preliminary motion had been made to compel defendant to produce records of the Veterans Bureau, the Court declared (p. 601):

> "* * * We conclude, therefore, that plaintiff's motion should have been sustained, and the defendant required to produce the record for inspection by plaintiff's counsel; but *as it was produced at the trial and there is nothing to show that the failure to produce it earlier resulted in prejudice,* we further conclude that the overruling of the motion was not prejudicial error." (Emphasis added.)

And in *Liquid Veneer Corporation v. Smuckler, supra,* where a motion to dismiss on jurisdictional grounds had been denied, this Court said (p. 202):

> "[3, 4] If error was committed in denying defendant's motin to dismiss made at the commence-

ment of the trial, or the denial of its objection to the introduction of any evidence, this *was cured by the amendment to the complaint during the course of the trial,* nor was there error in permitting the amendment. *No substantial right was prejudiced."* (Emphasis added.)

Again, in *Fujii v. Dulles, supra,* this Court permitted a claimed jurisdictional defect to be cured by supplemental pleadings, even though the statute under which jurisdiction was invoked had been repealed at the time the pleading was allowed.

In the instant cases any defect arising from appellant's omission to file affidavits showing good cause with the complaints was cured by receipt of the affidavits in evidence [R. 123-127, Exs. 1 and 16], and by evidence produced by the Government during trial. The Government offered the testimony of nine witnesses: four naturalization examiners [R. 45-172]; three former members of the Communist Party [R. 173-385], one handwriting expert [R. 385-392], and one fingerprint expert [R. 394-396]; and forty-three exhibits were received in evidence on behalf of appellant [Exs. 1 through 29 and 31 through 44]. This evidence, it is submitted, not only showed good cause for commencing the present actions, but established the allegations of the complaints by clear, convincing and unequivocal evidence.

While no attempt will here be made to summarize all of the evidence, it should be noted that the First Cause of Action[4] alleges wilful misrepresentation and concealment

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[4]The Second Cause of Action was dismissed as to appellee David Diamond [R. 22] and stricken as to appellee Freeda Diamond [R. 23].

of material facts concerning matters which may be synthesized into three categories:

1. The fact that appellees had used and had been known by names other than those given during naturalization proceedings.

2. The fact that appellees were at the time of their naturalization and had been prior thereto members of the Communist Party.

3. The fact that appellees' intentions and state of mind were different from those represented during naturalization proceedings.

It is clear that appellee David Diamond had previously used the names of Abe Slater and David Thornson. On January 16, 1932, he was arrested by the Police Department, Long Beach, California, at which time he gave the name of Abe Slater [Ex. 13].[5] During or about 1933 appellee David Diamond executed in his own handwriting [R. 387] a Registration Card for the Communist Party in the name of David Thornson [Ex. 9, R. 201-204, 323-324]. He was also known by witnesses William Ward Kimple and John L. Leech to have used the name David Thornson as a Communist Party name [R. 203, 322].

Yet during naturalization proceedings appellee David Diamond failed to disclose his prior use of the names David Thornson and Abe Slater, notwithstanding the many opportunities he had to do so. On documents bear-

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[5]At the time of his arrest appellee David Diamond was fingerprinted, and during trial a fingerprint expert testified that the fingerprints appearing on Ex. 13 were the same as those appearing on Ex. 12, which bears the signature "David Diamond". The latter signature was proved by the testimony of a handwriting expert [R. 388].

ing his signature[6] and requiring him to give any other names used, he gave only the names David Diamond, Dave Diamond, and David Dumanus [Ex. 3, item 1; Ex. 4, item 3, p. 1, and item (1), p. 3; Exs. 2 and 5, item (1)]. While being questioned under oath [R. 50] by the preliminary naturalization examiner he was specifically asked to give any name he had used at any time, and he still failed to disclose the names of David Thornson and Abe Slater [R. 52-55, 66-68]. And again, while being examined by the designated naturalization examiner he swore that the statements he had previously made during naturalizaiton proceedings were true [R. 85].

It is equally clear that appellee Freeda Diamond had previously used the name of Florence Slater.[7] Two Communist Party membership books were issued to her in the name of Florence Slater [Exs. 26 and 27] and she signed a receipt for one of these books [Ex. 28] in her own handwriting [R. 390-392]. Witness Kimple knew that appellee Freeda Diamond used the Communist Party name of Florence Slater [R. 208-209]. Yet she failed to disclose during naturalization proceedings her prior use of the name Florence Slater. This name was not disclosed on various naturalization documents bearing her

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[6]The authenticity of the signatures of appellee David Diamond on the various naturalization documents was admitted in a stipulation during trial, which was read into the record [R. 112-117].

[7]The alleged prior use of the names Freida Slater and Freda Slater as shown in the original complaint [R. 15] was deleted by stipulation during trial [R. 118].

signature[8] and requiring her to disclose all names she had previously used [Ex. 18, item 1; Ex. 19, item (3), p. 1 and item (1), p. 3; Exs. 17 and 20, item (1)]; nor when she was questioned under oath concerning prior names by the preliminary naturalization examiner [R. 152-155].

The wilful misrepresentation and concealment by appellees of the fact that they had previously used other names in itself established good cause for instituting actions against them; since concealment and misrepresentation of a fact may constitute grounds for denaturalization, even though the fact, if revealed would not have prevented naturalization (*United States v. Montalbano,* 236 F. 2d 757, 759-760 (C. A. 3, 1956); *Corrado v. United States,* 227 F. 2d 780, 784 (C. A. 6, 1955), cert. den. 351 U. S. 925; and note *United States v. Marcus,* 1 F. Supp. 29 (D. N. J., 1932), where a certificate of naturalization was cancelled upon the sole ground that the defendant had falsely stated in her Petition for Naturalization that she was single, whereas in fact she was married).

However, the other grounds for denaturalization were equally well established although appellant will only comment upon the evidence. The uncontradicted and unimpeached testimony of three witnesses, buttressed by official documents of the Communist Party, established appellees' membership and activities in the Communist Party, be-

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[8]The signatures of appellee Freeda Diamond on naturalization documents relating to her were admitted in her Answer to Plaintiff's Request for Admissions [R. 31-34].

ginning in the case of appellee husband as early as 1922 [Exs. 8 and 9], and continuing in the case of both appellees during 1944 [R. 369-383].[9] Both appellees were asked questions by naturalization examiners which called for a revelation of their membership in the Communist Party [R. 55-56, Exs. 23, 24; R. 100-107, 151]; yet this membership was not disclosed. Their long continued and active participation in the program of the Communist Party shows that they had embraced the principles of Communism and were not attached to the principles of the Constitution of the United States,[10] rendering their oaths of allegiance and other statements relating to their state of mind and intentions false.

It is therefore submitted that whether filing of the affidavit be deemed procedural or jurisdictional, any defect arising from the initial failure of the Government to file affidavits in the instant cases was cured when on March 2, 1956 the Government rested its case [R. 402].

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[9]Both the court and opposing counsel were apparently well satisfied that membership in the Communist Party had been clearly established. Counsel for appellee David Diamond stated [R. 413]:

> "Mr. Brock: There is enough evidence on membership that nothing Mr. Dooley could add to it would make it any greater than it already is. He knows that, we know it and the court knows it."

[10]As Judge Yankwich pointed out in *United States v. Title,* 132 F. Supp. 185 (S.D. Cal., 1955) at page 196:

> "One who embraces a totalitarianism which extolls the achievements of a party which attained its end by violent revolution and civil war and which openly and avowedly repudiates democracy and liberty as we understand them cannot be said to be 'attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.'"

III.

The District Court Erred in Dismissing Appellant's Actions Since Appellees Were in No Way Prejudiced by Appellant's Initial Omission to File Affidavits Showing Good Cause.

It is well established that errors as to procedure are harmless unless prejudice results (*Carlisle Packing Co. v. Sandanger,* 259 U. S. 255, 259-260 (1922); *West v. Camden,* 135 U. S. 507, 521 (1890); *Lancaster v. Collins,* 115 U. S. 222, 227 (1885); *Mobile & Montgomery R. Co. v. Jurey,* 111 U. S. 584, 593 (1883); *Decatur Bank v. St. Louis Bank,* 88 U. S. 294, 301 (1874); *Nolander v. Butte Valley Irr. Dist.,* 132 F. 2d 704, 706 (C. C. A. 9, 1942); *Sacramento Suburban Fruit Lands Co. v. Lindquist,* 39 F. 2d 900 (C. C. A. 9, 1929), cert. den. 282 U. S. 853; *United States Casualty Co. v. Drew,* 5 F. 2d 498 (C. C. A. 9, 1913); 5 C. J. S., Appeal & Error, §1680). This rule is equally applicable to criminal cases (*Bowles v. United States,* 319 U. S. 33 (1943)), even though a statutory provision has not been complied with (*Segurola v. United States,* 275 U. S. 106, 109-110 (1927); *Seadlund v. United States,* 97 F. 2d 742 (C. C. A. 7, 1938)).

Appellees were in no way prejudiced through the original omission of the Government to file affidavits showing good cause. These affidavits had been shown to counsel for appellee Freeda Diamond at a pre-trial conference and said counsel had been informed that they were to be introduced at trial as to both appellees [R. 125, 126]. On February 28, 1956, the opening day of trial, the affidavits were received in evidence [R. 123-127], and the next day a copy was served upon counsel for appellees [R. 238-239]. During trial, not only was good cause shown for instituting actions for denaturalization against appellees,

but clear and convincing evidence was produced establishing the allegations of the complaints.

The basic reason advanced by the Supreme Court for the affidavit requirement was to prevent a citizen from being subjected to a suit for denaturalization, with its "serious consequences" to his reputation without justification (351 U. S. pp. 99-100). In the instant appeals appellees are not innocent persons who have been subjected to unfounded litigation. Evidence produced at trial clearly established that the Government was fully warranted in bringing denaturalization suits against them.

Conclusion.

Wherefore, for the reasons set forth above, it is respectfully submitted that the Order of the District Court should be reversed and the causes remanded, with directions to adjudicate each of the actions against appellees upon its merits.

Respectfully submitted,

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